Supreme Court, U.S.
FILED

(1)

No. 02-1462 APR 2 2003

In The
Supreme Court of the United States

STEPHEN MICHAEL COHEN,

Petitioner,

v.

GARY KREMEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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73 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether prior to declaring Petitioner a "fugitive from justice" a Court must determine that jurisdiction exists in the underlying case, otherwise Petitioner, who challenged Plaintiff's standing, is not a fugitive from "justice"?

2. Whether the Ninth Circuit erred in disregarding the unanimous decision in *Degen v. United States*, 517 U.S. 820 (1996) by applying its inapposite decision in *Parretti v. United States*, 143 F.3d 508 (9th Cir. 1998) (en banc)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Stephen Michael Cohen, respectfully prays that a Writ of Certiorari issue to review the per curiam opinion of the United States Court of Appeals for the Ninth Circuit filed August 30, 2002 which upheld the judgment of the United States District Court for the Northern District of California by dismissing his appeal pursuant to the fugitive disentitlement doctrine.

OPINIONS BELOW

The opinion for which review is sought is *Gary Kremen v. Stephen Michael Cohen,* Ninth Circuit Case No. 01-15886 (August 30, 2002) (Appendix A), which refused to review the judgment of the trial court (Appendix B). Rehearing with suggestion en banc was denied January 3, 2003 (Appendix E). Opinions resulted to Petitioner's are: Order Certifying Question to California Supreme Court in *Gary Kremen v. Network Solutions, Inc., a Delaware Company*, Ninth Circuit Case No. 01-15899 (January 22, 2003) (Appendix C) and *Gary Kremen v. Stephen Michael Cohen and Network Solutions, Inc.*, California Supreme Court Case No. S112591 (February 25, 2003) (Appendix D).

JURISDICTION

Petitioner invokes the jurisdiction of this court under 28 U.S.C. §1254(1).

On January 3, 2003, the United States Court of Appeals entered its decision upon denial of a petition for rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution states in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

On July 10, 1998, Gary Kremen and Online Classifieds, Inc. filed a Complaint in the United States District Court for the Northern District of California against Petitioner Cohen and corporate entities, which by the Fourth Amended Complaint became Ocean Fund Internacional, Ltd., Ynata, Ltd., Sand Man Internacional, Ltd. and Network Solutions, Inc.

Network Solutions, Inc. (NSI) had initially registered "sex.com" to Online Classifieds, Inc. (OCI), a non-existent corporation, in 1994 with Kremen being listed as its contact. The complaint alleged that in 1995, without Kremen's authorization, Petitioner caused "sex.com" to be deleted and later re-registered to himself by NSI through the use of a forged letter purporting to be from Online Classifieds, Inc.

In his initial Complaint and First Amended Complaint, Kremen asserted that OCI, a Delaware corporation he created in 1998, owned "sex.com." In his deposition (p. 447-48) Kremen said the Delaware corporation owned all the rights owned by Online Classifieds, Inc., the sole proprietorship. As a shareholder Kremen had no standing to bring an action for the Delaware corporation, nor has he ever asserted that he received an assignment of the "sex.com" domain name back from OCI-Delaware. If

Kremen had any property rights he lost them when they were transferred to OCI-Delaware. When OCI-Delaware was dismissed by the court, he was left without any semblance of standing.

After the district court dismissed OCI-Delaware as a plaintiff, in subsequent complaints Kremen crawfished away from his original position to contend that at all times OCI was his dba. Kremen, who holds an MBA from Stanford University, claimed at his deposition that "I don't know if 'Inc.' means incorporated company" (p. 200). He did not register the dba and said he might have had partners in the dba. Kremen never reacquired standing because he had transferred his rights. The district court, however, rejected Petitioner's objections regarding Kremen's lack of standing. (This description regarding standing is not all-inclusive, but illustrates Petitioner's substantial standing issue.)

The district court imposed numerous evidentiary and issue sanctions on Petitioner, effectively precluding any real defense at trial. The court also held Petitioner in contempt and ultimately declared him to be a fugitive for failing to appear. This occurred after the court, granting Kremen's request for a preliminary injunction, ordered Petitioner to deposit $25 million with the court and gave Kremen immediate possession of "sex.com" (which he could license for $500,000 per month), and valuable real estate in San Diego worth millions of dollars. Ultimately, the trial court awarded $65 million to Kremen.

Petitioner, a United States citizen, did not flee to Mexico. He resided there. This was the one constant fact alleged in each of Kremen's complaints, which kept altering the facts under which Kremen claimed standing.

Petitioner did not voluntarily remain in Mexico in violation of the district court's order. He was detained there by Mexican authorities for repatriating to the district court through his attorneys two checks issued to Mexican corporations totaling $1,080,000. These checks had been issued the same day the court issued its judgment for Kremen. Thus, Petitioner's efforts to comply with the district court's directive placed him at odds with the Mexican authorities who detained him so that an investigation could be undertaken regarding the loss incurred by the Mexican corporations.

Apostille documents from the Mexican government were presented to the court to verify the continuing Mexican detention status of Petitioner from February 7, 2001 forward. (Appendix E, one of a sequence of such documents commencing in February 2001.) These documents bore indicia of reliability and were admissible under the 1961 Hague Convention. T.I.A.S. 10072, 33 UST 883. The court, without undertaking any effort to confirm these documents with the Mexican government officers identified therein, refused to consider these properly authenticated documents rendered in accordance with the terms of international law and held no hearing after their receipt.

The court also did not consider the effect of Kremen's use of the "sex.com" site to post a $50,000 reward for the return of Petitioner to California. The posting included a photograph of Petitioner, his address in Mexico and maps. This posting culminated with at least two gun battles between would-be bounty hunters and Mexican police guarding Petitioner. People were shot. Petitioner filed a motion to vacate the arrest warrant citing the threat to human life. The trial court denied the motion. Kremen's wanted poster for Petitioner (in both English and Spanish) remained on the "sex.com" site.

The threat to his life made it almost impossible for Petitioner to leave Mexico. Moreover, if he disregarded the detention order and left Mexico, he would become a fugitive there.

In sum, Petitioner did not flee to Mexico. As even Kremen's complaints represented, Petitioner resided in Mexico. He was detained there. Mexico was the site of the "sex.com" business and the site of at least one defendant corporation. Petitioner never hid in Mexico. Moreover, Kremen took Petitioner's deposition in Mexico.

ARGUMENT

This case marks the ultimate expansion of the fugitive disentitlement doctrine. What originated as a remedy authorizing the dismissal of the appeal of an absconding criminal defendant has spilled over into certain civil cases, usually ones where related criminal charges are pending, a foreign national is involved, and the "fugitive from justice" cannot be located. Petitioner Cohen is a United States citizen who at all items was living at a known address in Mexico, was readily accessible and was not the subject of criminal charges.

Two issues cause this case to be exceptional.

First, before an appellate court can declare Petitioner a "fugitive from justice" there must be a determination that jurisdiction exists for the underlying case filed, otherwise he is not a fugitive from "justice." The solitary issue Petitioner raised on appeal was jurisdictional, namely, plaintiff Kremen's lack of standing.

Second, Petitioner who never fled the jurisdiction, but resided in Mexico at all times, was placed under house arrest by the Mexican government because he repatriated checks to the United States to comply with a district court order and therefore cannot be deemed a fugitive. Moreover, the party asserting the fugitive disentitlement bar posted a $50,000 internet reward for Petitioner's arrest, which resulted in several shootouts and made his potential return to the United States a hazardous proposition. Finally, in assessing whether Petitioner was being detained by the Mexican government, the court refused without a hearing to recognize apostille documents confirming his detention, thereby violating principles of international law and policy.

The fugitive disentitlement doctrine by its very nature must be of exceedingly limited application and strictly construed. Application of the doctrine is not "necessary" and would violate the constitutional rights of Petitioner were it to be applied to preclude his appeal of the very rulings upon which his alleged "fugitive" status is based. See *Degen v. United States,* 517 U.S. 820 (1996). It is unconstitutional to use disentitlement as punishment for contempt of court. *Id.* at 828. This is particularly true when the judge's order was to imprison Petitioner for a civil debt. "A court's inherent power is limited to the necessity giving rise to its exercise. There was no necessity to justify the rule of disentitlement in this case. . . . " *Id.* at 829.

Typically, to be a "fugitive from justice" requires that one be an actual fugitive who fled the jurisdiction and willfully refused to return. Although some authority exists suggesting that the fugitive disentitlement doctrine may be applied to a fugitive incarcerated in a foreign jurisdiction,

the special circumstances found in those cases do not apply here. Those cases involve individuals who either fled this country only to be imprisoned in a foreign country and thereafter claimed not to still be a fugitive or who actively resisted their return to the United States. *See, e.g., United States v. Timbers Preserve*, 999 F.2d 452, 456 (10th Cir. 1993), *United States v. Eng,* 951 F.2d 461, 464 (2d Cir. 1991), and *United States v. Catino*, 735 F.2d 718, 722, (2d Cir.), *cert. denied*, 469 U.S. 855 (1984). Petitioner, however, did not flee to Mexico, he resided there and conducted business there at all times. He was placed under detention for complying with a district court directive. This act obviously was not one of resistance to his return to the United States.

The Ninth Circuit heard argument in Kremen's cross-appeal of NSI's summary judgment concurrently with Petitioner's appeal and was so intrigued by whether an internet domain name falls within the scope of property subject to the tort of conversion that Kremen was granted a full hour of argument. Subsequently, the panel certified the question to the California Supreme Court. (Appendix C.) The California Supreme Court denied the request. (Appendix D.)

An impressive amount of research and labor was expended by the panel on the conversion issue as its Order Certifying Question to the California Supreme Court evidences. Months prior to this order the Ninth Circuit panel summarily disposed of Petitioner's case citing *Paretti v. United States*, 143 F.3d 508 (9th Cir. 1998), as precedent for application of the fugitive disentitlement doctrine to dismiss Petitioner's appeal.

Had Petitioner's argument that Kremen lacked standing been determined by the panel, it is likely to have prevailed. It is inescapable that a consequence of such a ruling is the mooting of the conversion issue addressed in the Kremen/NSI appeal because lack of standing would bar Kremen there as well. One cannot help but think that in some way the Ninth Circuit panel's judgment was clouded by the thought, "All this work for nothing."

The panel's decision to exercise its "discretion to dismiss the appeal pursuant to the fugitive disentitlement doctrine" based on *Parretti v. United States*, 143 F.3d 508, 510-11 (9th Cir. 1998) (en banc) is misguided. The facts here are not like those in *Paretti*. Petitioner did not flee the United States, was not a foreign national and did not have a pending criminal case.

The rationales cited in *Paretti* draw heavily upon *Ortega-Rodriguez v. United States,* 507 U.S. 234 (1993). The concern expressed that any "judgment . . . issued would prove (un)enforceable" does not exist since the preliminary injunction had already resulted in a transferred domain name licensable at $500,000 per month and the real property transferred has already been used by plaintiff as collateral for a two million dollar loan.

The other rationale that "dismissal by an appellate court after a defendant has fled its jurisdiction serves an important function and advances an interest in efficient dignified appellate practice," assuming Petitioner can be said to have fled, was heavily undercut by the unanimous reversal of the Ninth Circuit in *Degen v. United States*, 517 U.S. 820 (1996). Other circuits have recognized this. See *FDIC v. Pharaon,* 178 F.3d 1159, 1162-63 (11th Cir. 1999).

The Court in *Degen* said "the sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits." *Id.* at 829. Moreover, *Degen* relates that a civil party's absence entitles him to no advantage since the district court, as happened here, could impose sanctions. *Id.* at 827.

Lastly, the *Parretti* argument that Petitioner's status as a fugitive "disentitles him from calling upon the resources of the Court to resolve his claims" is not appropriate here since the court must first resolve its own jurisdiction, namely, that if plaintiff did not have standing, there is none. See, *e.g. Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-62 (1992).

If anything is to be gleaned from *Degen,* it is that the doctrine of fugitive disentitlement is in recession in civil cases. Petitioner never became a "fugitive", he could always be found. He did not "escape", he remained where he always was. His actions in pressing Kremen's lack of standing do not threaten the dignity of the court. Indeed, the dignity of the court is enhanced when it examines whether it possesses jurisdiction because that increases its respect. *Degen* at 824-29.

In sum, no rational basis exists for the panel's exercise of its discretion, and without any recitation of facts in support, its decision must be viewed as arbitrary, particularly in light of the facts expressed herein. Petitioner's Fifth Amendment right not to be deprived of property without due process of law has been violated. Moreover, guidance regarding how to treat the actions of an opposing

party who acts to perpetuate the "fugitive" status about which he complains is necessary. Additionally, the specter of loss of international respect engendered by the district court's act of disregarding a foreign country's apostille documents and mandating a violation of that country's laws to comply with its order must be carefully considered.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's dismissal on the basis of fugitive disentitlement should be reversed and the case remanded with directions to consider Petitioner's standing argument. A reversal will help establish a consistent approach to the fugitive disentitlement doctrine in accord with governing case law and the recognition that jurisdictional considerations and international policy play a dominant role in the calculus.

Dated: April 2, 2003.

Respectfully submitted,

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APPENDIX A

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY KREMEN,

Plaintiff-Appellee,

and

ONLINE CLASSIFIEDS, INC.,

Plaintiff,

v.

STEPHEN MICHAEL COHEN, an individual; OCEAN FUND INTERNATIONAL, LTD., a foreign company; SAND MAN INTERNACIONAL LTD., a foreign company; YNATA LTD.,

Defendants-Appellants,

and

SPORTING HOUSES MANAGEMENT CORPORATION, a Nevada company; SPORTING HOUSES OF AMERICA, a Nevada company; SPORTING HOUSES GENERAL INC., a Nevada company; NETWORK SOLUTIONS, a Delaware company; WILLIAM DOUGLAS,

No. 01-15886

D.C. No.
CV-98-20718-JW

MEMORANDUM*

(Filed Aug. 30, 2002)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Sir, an individual; VP BANK (BVI) LIMITED, a foreign company; ANDREW KEULS, an individual; MONTANO PROPERTIES LLC, a California Limited Liability Company,

Defendants

GARY KREMEN, an individual,

Plaintiff-Appellant,

and

ONLINE CLASSIFIED, INC., a Delaware Company,

Plaintiff,

v.

STEPHEN MICHAEL COHEN, an individual; OCEAN FUND INTERNATIONAL, LTD., a foreign company; SAND MAN INTERNACIONAL LTD., a foreign company; SPORTING HOUSES MANAGEMENT CORPORATION, a Nevada company; SPORTING HOUSES OF AMERICA, a Nevada company; SPORTING HOUSES GENERAL INC., a Nevada company; WILLIAM DOUGLAS, Sir, an individual; VP BANK (BVI) LIMITED, a foreign company; ANDREW KEULS, an individual; MONTANO PROPERTIES LLC, a California Limited Liability Company;

No. 01-15899

D.C. No. CV-98-20718-JW

YNATA LTD.,

Defendants,

and

NETWORK SOLUTIONS, a Delaware company,

Defendant-Appellee.

GARY KREMEN, an individual,

Plaintiff-Appellee,

and

ONLINE CLASSIFIED, INC., a Delaware Company,

Plaintiff,

v.

STEPHEN MICHAEL COHEN, an individual; OCEAN FUND INTERNATIONAL, LTD., a foreign company; SAND MAN INTERNACIONAL LTD., a foreign company; SPORTING HOUSES MANAGEMENT CORPORATION, a Nevada company; SPORTING HOUSES OF AMERICA, a Nevada company; SPORTING HOUSES GENERAL INC., a Nevada company; WILLIAM DOUGLAS, Sir, an individual; VP BANK (BVI) LIMITED, a foreign company; ANDREW KEULS, an individual; YNATA LTD.,

Defendants,

No. 01-17034

D.C. No. CV-98-20718-JW

and

MONTANO PROPERTIES LLC, a California Limited Liability Company,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted August 13, 2002
San Francisco, California

Before: **KOZINSKI** and **McKEOWN**, Circuit Judges, and **FITZGERALD**,** District Judge.

In light of Cohen's status as a fugitive from justice and his egregious abuse of the litigation process, we exercise our discretion to dismiss his appeal pursuant to the fugitive disentitlement doctrine. *See Parretti v. United States,* 143 F.3d 508, 510-11 (9th Cir. 1998) (en banc). The appeal in No. 01-15886 is therefore DISMISSED as to all appellants.

We reach the merits of Montano's appeal in No. 01-17034. The district court did not abuse its discretion in advancing Montano's trial date. *See Muckleshoot Tribe v. Lummi Indian Tribe,* 141 F.3d 1355, 1358 (9th Cir. 1998). The due process claim is meritless for similar reasons. AFFIRMED.

** The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

The appeal in No. 01-15899 remains under submission.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GARY KREMEN,

Plaintiff,

v.

STEPHEN MICHAEL COHEN,

Defendant. /

NO. C98-20718 JW
JUDGMENT

The Court hereby enters judgment in favor of Plaintiff Gary Kremen against Defendants, Stephen Michael Cohen, Ocean Fund Internacional Ltd., Ynata Ltd. and SandMan Internacional, Ltd., jointly in the amount of $40,000,000, plus punitive damages in the sum of $25,000,000.00.

A constructive trust is imposed upon all monies and properties of the Defendants. The Receiver is ordered to collect and hold such properties pending further order of this Court.

The warrant of arrest issued on March 2, 2001 shall remain outstanding until defendant Stephen M. Cohen surrenders the property of each defendant to this Court.

Dated: April 3, 2001

/s/ James Ware
JAMES WARE
United States
District Judge

APPENDIX C

REVISED January 22, 2003

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY KREMEN, an individual,
Plaintiff-Appellant,

and

ONLINE CLASSIFIEDS, INC.,
a Delaware Company,
Plaintiff,

v.

STEPHEN MICHAEL COHEN,
an individual; OCEAN FUND
INTERNATIONAL LTD., a
foreign company; SAND MAN
INTERNACIONAL LTD., a
foreign company; SPORTING
HOUSES MANAGEMENT
CORPORATION, a Nevada
company; SPORTING HOUSES
OF AMERICA, a Nevada
company, SPORTING HOUSES
GENERAL INC., a Nevada
company; WILLIAM DOUGLAS,
SIR, an individual; VP BANK
(BVI) Limited, a foreign
company; ANDREW KEULS,
an individual; MONTANO
PROPERTIES LLC, a
California Limited Liability
Company; YNATA LTD.,
Defendants,

and

No. 01-15899

D.C. No.
CV-98-20718-JW
Northern District of
California, San Jose

ORDER
CERTIFYING
QUESTION TO
THE CALIFORNIA
SUPREME COURT

NETWORK SOLUTIONS, a Delaware company,
Defendant-Appellee.

Filed January 3, 2003

Before: Alex Kozinski, M. Margaret McKeown, Circuit Judges, and James M. Fitzgerald, District Judge.[1]

ORDER

We certify to the California Supreme Court the question set forth in Part II of this order. All further proceedings in this case are stayed pending final action by the California Supreme Court, and this case is withdrawn from submission until further order of this court.

I

CAPTION AND COUNSEL

Gary Kremen is deemed the petitioner in this request because he appeals from the district court's adverse rulings on the issue certified. The caption of the case is:

GARY KREMEN, an individual, Plaintiff-Appellant, and	No. 01-15899

[1] The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

ONLINE CLASSIFIEDS, INC., a Delaware Company,

Plaintiff,

v.

STEPHEN MICHAEL COHEN, an individual; OCEAN FUND INTERNATIONAL LTD., a foreign company; SAND MAN INTERNACIONAL LTD., a foreign company; SPORTING HOUSES MANAGEMENT CORPORATION, a Nevada company; SPORTING HOUSES OF AMERICA, a Nevada company; SPORTING HOUSES GENERAL INC., a Nevada company; WILLIAM DOUGLAS, Sir, an individual; VP BANK (BVI) LIMITED, a foreign company; ANDREW KEULS, an individual; MONTANO PROPERTIES LLC, a California Limited Liability Company; YNATA LTD.,

Defendants,

and

NETWORK SOLUTIONS, a Delaware company,

Defendant-Appellee.

D.C. No.
CV-98-20718-JW
Northern District of
California, San Jose

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Other counsel appeared for the other-named parties in this appeal; those counsel are not listed here because the claims related to those parties were disposed of by separate disposition as set out in Part III of this order.

II

QUESTION CERTIFIED

Pursuant to Rule 29.5(a) of the California Rules of Court, we respectfully request the California Supreme Court to exercise its discretion to adjudicate a question of California law related to Internet domain names and the tort of conversion. This particular case centers on the domain name "sex.com." The decisions of the California appellate courts provide no controlling precedent regarding the certified question, the answer to which may be determinative of this appeal. We respectfully request that the California Supreme Court answer the certified question presented below. We acknowledge that your Court may decide to reformulate the question, and our phrasing of the issue is not intended to restrict your Court's consideration of

the case. We agree to follow the answer provided by the California Supreme Court.

We invoke the certification process only after careful consideration and do not do so lightly. The certification procedure is reserved for state law questions that present significant issues, including those with important public policy ramifications, and that have not yet been resolved by the state courts. We request certification not because a difficult legal issue is presented but because of deference to the state court on significant state law matters.[1] We have noted, in reference to *Arizonans for Official English v. Arizona*,[2] 520 U.S. 43, 62, 76 79 (1997), that "we have an obligation to consider whether novel state-law questions should be certified – and we have been admonished in the past for failing to do so." *Parents Involved in Community Schools v. Seattle School District*, 294 F.3d 1085, 1086 (9th

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[1] Certification "strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to rule on an undecided or unclear issue. . . . Allowing federal courts to defer to state courts in such cases reinforces the federal judiciary's acknowledgment of state sovereignty and fosters values of federalism and comity in a way beneficial to state interests." Jerome I. Braun, *A Certification Rule for California*, 36 Santa Clara L.Rev. 935, 940 (1996).

[2] Although the *Arizonans* case involved a constitutional question, neither the California rule nor practice requires that the issue be a constitutional one. Indeed, the procedure is designed to let the California Supreme Court decide whether it wants to have the first crack at a significant state-law issue and the majority of certifications that your Court has accepted have not involved a constitutional question. *See e.g., Cadence Design Sys., Inc. v. Avant! Corp.*, 253 F.3d 1147 (9th Cir. 2001) (trade secret question); *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.*, 238 F.3d 1159 (9th Cir. 2001) (tort question); *Blue Ridge Ins. Co. v. Jacobsen*, 197 F.3d 1008 (9th Cir. 1999) (insurance question); and *Asmus v. Pac. Bell*, 159 F.3d 422 (9th Cir. 1998) (employment question).

Cir. 2002) (certifying question despite parties' unanimous request not to certify) (oral arguments heard on certified question in Washington State Supreme Court on October 24, 2002).

Although we are quite capable of resolving the issue presented, we should not reach out to grab the question in the first instance simply because the case involves a novel and "sexy" issue. We are not, of course, unmindful of the burgeoning caseload of the California Supreme Court, and we recognize that the decision to accept certification lies solely within the discretion of your court. But it is not our role to pass advance judgment on the Court's priorities. We would not presume to certify a run-of-the-mill case to your Court nor would we use the certification process to sidestep our diversity jurisdiction. In a case such as this one that raises a new and substantial issue of state law in an arena that will have broad application, the spirit of comity and federalism cause us to seek certification. We accordingly invoke this procedure under the California Rules of Court.

The question of law to be answered is:

Is an Internet domain name within the scope of property subject to the tort of conversion?

(a) For the tort of conversion to apply to intangible property, is it necessary that the intangible property be merged with a document or other tangible medium?

(b) If the answer to Question (a) is "yes," does the tort of conversion apply to an Internet domain name, or, more specifically, is an Internet domain name merged with a document or other tangible medium?

III

STATEMENT OF FACTS

This action stems from Gary Kremen's ("Kremen") suit against Network Solutions, Inc. ("NSI") for the fraudulent transfer of his properly-registered Internet domain name, "sex.com," to a third party.

A short background regarding the Internet will assist in putting this case in context. The Internet has been described as "a vast system of interconnected computers and computer networks." *See Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 576 n.1 (2d Cir. 2000). Each computer that is connected to the Internet has a unique Internet Protocol ("IP") number that functions as a kind of Internet address. *Id.* An IP number consists of four sets of numbers separated by periods. *Id.* at 576. Early Internet innovators created the Domain Name System ("DNS"), a system designed to relate easily-remembered domain names with difficult-to-remember IP numbers. Domain names are comprised of alphanumeric fields separated by dots – e.g., <www.courtinfo.ca.gov> – where the field farthest to the right (".gov" in the example) is the Top Level Domain ("TLD"). *Id.* at 577. The field second from the TLD is the Second Level Domain; and the field third from the TLD is the Third Level Domain. *Id.*

Under a cooperative agreement entered into with the National Science Foundation ("NSF") on January 1, 1993, NSI became the exclusive registrar for various TLDs, including ".com". By accepting the role of registrar, NSI took "primary responsibility for ensuring the quality, timeliness and effective management of the registration services provided" under the agreement. The agreement expired on September 30, 1998; thereafter other entities

have shared the role of domain name registrar. From April 1993 until September 1995, NSI provided its registration service to the public at no cost. During this period, NSF paid NSI a fixed fee and costs for registering domain names.

Under its agreement with NSF, NSI undertook responsibility to "compile and maintain an authoritative, reliable, and up-to-date database" of registered domain names in addition to the conversion tables that index registered domain names to IP numbers.

On May 9, 1994, Kremen registered the domain name "sex.com" with NSI. Kremen did so by filling out and electronically submitting a short registration form. No payment was necessary in order to effect the registration. Kremen registered sex.com under his d/b/a "Online Classifieds, Inc." ("OCI") and listed himself as the administrative and technical contact person. Kremen did not use the domain name for any significant purpose during the 18 months that it was registered to OCI.

In October 1995, NSI received a letter on OCI letterhead and putatively signed by OCI's president. The letter was addressed to Stephen Cohen ("Cohen") and purportedly authorized him to notify NSI on OCI's behalf that NSI should delete the sex.com domain name from its database, thereby terminating OCI's registration. The letter further stated that OCI had no objection to Cohen's registering sex.com in his own name.

Upon receipt of the letter, NSI deleted OCI's registration of sex .com and re-registered it to Sporting Houses Management, Inc., one of Cohen's alter ego corporations, with Cohen listed as the administrative contact. Cohen proceeded to use the sex.com domain name as a platform

upon which to build a lucrative Internet-based pornography business. As it turned out, the so-called authorization letter was a forgery concocted by Cohen or at his behest. NSI claims that there was no evidence to question the authenticity of the letter, although Cohen disputes that characterization.

Approximately eight months after NSI registered sex.com in Cohen's name, Kremen demanded that NSI reinstate his registration of sex.com. NSI informed him that it would not do so absent a court order. In October 1998, Kremen brought suit against Cohen and NSI seeking injunctive relief and damages. Kremen alleged, among other things, that by honoring Cohen's fraudulent instruction to transfer the sex.com registration, NSI was liable in tort for conversion and as a bailee. Kremen also brought other state law claims that are not at issue in this certification request.

Judge Ware, of the District Court for the Northern District of California, granted summary judgment in favor of NSI, concluding that there was "no evidence establishing that a domain name, including sex.com, is 'merged in or identified with' a document or other tangible object. . . . Thus, under the traditional precepts governing the tort of conversion, a domain name is not protected intangible property." In the district court's view, extending the tort of conversion to include Internet domain names involves a complex policy question that is more appropriately the subject of legislation. The district court also expressed concern that because the tort is one of strict liability, extending the tort to include domain names would "essentially scrap any requirement of tangibility consistently associated with the tort," and, in its view, "there are methods better suited to regulate the vagaries of domain

names." The court rejected the bailment claim on the basis that "NSI's mere registration of names does not convert its function to a bailee."

On Kremen's claims against Cohen regarding the transfer letter and the appropriated domain name, the district court found that the purported transfer letter was a forgery and that the transfer of the domain name was void and a nullity. The court restored registration of sex.com to Kremen, and rendered a judgment in favor of Kremen for $65 million, a judgment that Kremen has had very limited success in enforcing due to Cohen's fugitive status.

On appeal to our court, Kremen argued, among other claims, that the district court erred in concluding that no cause of action for conversion or bailment exists against NSI for its unauthorized registration of sex.com to Cohen. Consideration of Kremen's claims against NSI are stayed pending this certification request. We resolved the remaining claims between Kremen and Cohen and related entities in an unpublished memorandum disposition in which we affirmed the district court's judgment in favor of Kremen. *Kremen v. Cohen,* Nos. 01-15886, 01-15899, 01-17034, 2002 WL 2017073 (9th Cir. August 30, 2002). Neither Cohen nor any of his related entities are parties to the remaining proceedings, including this certification request.

IV

STATEMENT OF REASONS FOR CERTIFICATION

We respectfully request that the California Supreme Court provide an authoritative answer to the certified question for the following reasons:

The certified question presents an issue of significant precedential and public policy importance. Although both California state courts and the federal courts have broadly considered conversion in connection with intellectual property, such as trade secrets, neither has specifically considered the state law tort of conversion in the context of an Internet domain name. With the growing ubiquity and importance of the Internet and the number of domain names increasing exponentially – there are now some 30 million domain names[3] – clarity in the application of California state law to domain names presents an important question for resolution. The scope of state law claims relating to domain names extends not only to the relationship between a domain name holder and a domain registrar, but also to the relationship between domain name holders and other third parties. Your Court has counseled that courts should be cautious in imposing new tort duties where novel legal claims implicate serious public policy considerations. *Moore v. The Regents of the Univ. of Cal.*, 51 Cal. 3d 120, 142 (1990) (noting, in holding that patient did not hold ownership interest in cells after they left his body, that "the novelty of Moore's claim demands express

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[3] *See* Mylene Mangalindan, *Renew It or Lose It: Companies Often Forget to Renew Their Domain Names*, Wall St. J. (July 15, 2002), available in 2002 WL-WSJ 3400519.

consideration of the policies to be served by extending liability rather than blind deference to a complaint alleging as a legal conclusion the existence of a cause of action") (citations omitted). We believe that regulation of the Internet under state law presents such considerations, and consequently that this issue should be addressed in the first instance by your Court.

Following is a discussion of the background regarding the tort of conversion, as well as a summary of the parties' arguments and the relevant case law with respect to the application of conversion to Internet domain names. Appropriately, this recitation does not take the form of an advocacy memorandum. Instead, our role as the requesting court is to provide the California Supreme Court with the relevant legal landscape. We reference only California cases because California law is at issue.[4] Although we acknowledge that reasonable arguments exist on both sides of the issue, we do not advocate for a particular resolution to the question presented.

The parties do not dispute that domain names are a kind of property. This proposition appears to be consistent with California's broad definition of "property." *See* Cal. Civ. Code §§ 654 & 655 (property includes "all inanimate things which are capable of appropriation or of manual delivery"). The parties disagree, however, whether a domain name like sex.com is the kind of intangible property that can

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[4] We recognize that cases from other jurisdictions may be instructive, but they are not controlling. Likewise, citation to Ninth Circuit cases interpreting California law does not provide a definite interpretation from a California court. *See, e.g., Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082 (9th Cir. 2002).

support a claim for conversion. At issue is whether such intangible property constitutes a sufficiently definite right and whether such intangible property must also be merged into a document or other writing.

Historically, the tort of conversion exclusively protected rights in tangible property. At least one commentator has called the tangibility requirement a "hoary limitation" without "valid and essential reason." Val D. Ricks, *The Conversion of Intangible Property: Bursting the Ancient Trover Bottle With New Wine,* 1991 BYU L. Rev. 1681, 1682 (1991) (quoting Prosser and Keeton on the Law of Torts 91-92 (W. Page Keeton, ed., 5th ed. 1984)). California courts have, however, long extended the tort to certain forms of intangible property such as stocks, bonds, notes, recorded performances, and warehouse receipts. *See, e.g., A & M Records, Inc. v. Heilman,* 75 Cal. App. 3d 554, 570 (1977) (recorded performances); *A.J. Ralston v. The Bank of California,* 112 Cal. 208, 213 (1896) (stock and dividends); *Payne v. Elliot,* 54 Cal. 339, 341-42 (1880) (stock); *see also* 5 Witkin Summary Cal. Law (9th ed. 1988) Torts, § 613.

Kremen analogizes the domain name to a stock interest or warehouse receipt, thus putting the domain name firmly within the scope of property covered by the tort of conversion. NSI argues that the domain name, as a reference point in a computer database, does not rise to the level of a definite or certain property right.

In *Payne,* your Court stated that the tort "no longer exists as it did at common law, but has been developed into a remedy for the conversion of every species of personal property." 54 Cal. at 341. The question then arises as to the scope of coverage for intangible property. Years after

Payne, the California Court of Appeals stated that the language in *Payne* was "too broad a statement as to the application of . . . conversion." *Olschewski v. Hudson,* 87 Cal. App. 282, 288 (Cal. Ct. App. 1927) (concluding that conversion exists only for "property which is specific enough to be identified, and not to such indefinite, intangible and uncertain property rights as the mere goodwill of a business, or trade secrets"). The fact that *Payne* has stood the test of time provides little comfort in this situation as the case does not answer the question at hand – namely, the application of *Payne* to an Internet domain name that is categorized as intangible property. This area would thus greatly benefit from certification by your Court.

Question (a):

An analysis of the scope of intangible rights requires answering whether the rights must be reflected in some documentary form.

The Restatement of Torts provides that

> (1) Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights.
>
> (2) One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that for conversion, even though the document is not itself converted.

Restatement (Second) of Torts § 242. At least one California Court of Appeal has favorably viewed the Restatement's approach. In *Thrifty-Tel, Inc. v. Bezenek,* 46 Cal. App. 4th 1559, 1565 (1996), the court suggested that

tangible and intangible property may be treated differently for purposes of conversion.[5] The application of the language in *Thrifty-Tel* is unclear, however, because the court decided not to answer the question of "[w]hether . . . [an] intangible computer access code, which was never reduced to paper or reflected on a computer disk . . . could be the subject[ ] of conversion." *Id.* at 1565-66.

Two California Court of Appeals cases touch on the subject of documentary merger in connection with customer lists but do not address the issue presented in this certification. *See Palm Springs-La Quinta Dev. Co. v. Kieberk Corp.*, 46 Cal.App.2d 234, 240 (Cal. Ct. App. 1941) (concluding that destroying "tangible personal property consisting of a cabinet of lead cards containing the names and valuable information regarding prospective and actual" customers was conversion); *Olschewski,* 87 Cal. App. at 286 (finding no cause of action in conversion "for the unlawful interference with a laundry route, or any similar property" because "there is nothing definite or tangible in the character of the ordinary list of laundry customers").

Thus, there do not appear to be any California cases squarely addressing whether the "merged with" requirement is a part of California law, nor have we been able to locate any cases from your Court indicating whether California follows the Restatement's approach.

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[5] "Courts have traditionally refused to recognize as conversion the unauthorized taking of intangible interests that are not merged with, or reflected in, something tangible."

Question (b):

If your Court determines that, for purposes of conversion, intangible property must be merged with or reflected in a document or something tangible, we will then have to address a secondary question: whether the tort of conversion applies to an Internet domain name.

California courts have recognized a cause of action for intangible goods that have been merged with various kinds of tangible media. *See Thrifty-Tel,* 46 Cal. App. 4th at 1565 (trade secrets on a floppy disk); *A & M Records,* 75 Cal. App. 3d at 569-70 (recordings); *Payne,* 54 Cal. at 341 (stock certificates). Nonetheless, we have been unable to locate any cases addressing whether a domain name is sufficiently merged with tangible media to give rise to a claim for conversion. Although the parties' briefs detail the intricacies of the DNS database and competing arguments as to the appropriate portion or registry at issue, we do not take any position at this juncture. The positions of the parties serve to juxtapose the argument on both sides.

According to Kremen, a domain name is a unique functional object that serves to access the corresponding IP address. Kremen argues that a domain name is merged with and identified with a document, namely the DNS database or a portion thereof. The DNS database is described as a decentralized but hierarchical database that correlates a domain name with the appropriate IP address. *America Online, Inc. v. Huang,* 106 F. Supp. 2d 848, 851-52 (E.D. Va. 2000). Kremen characterizes the database as akin to a sophisticated compilation of several documents, albeit in electronic form. Kremen likens the embodiment of the domain name in the database to the right to possess property which is embodied by a warehouse receipt.

NSI counters that the DNS database is not like a warehouse receipt. Relying principally on the description in *America Online,* NSI notes that although the DNS matches domain names with IP numbers, "this simple description incorrectly suggests that the DNS is a central database to which other computers may refer, when the DNS is instead a decentralized, albeit hierarchal, process for correlating a domain name with the appropriate IP address." 106 F. Supp. 2d at 851. NSI instead likens a domain name to a phone number or address, not the type of property subject to conversion. *See Lockheed Martin Corp v. Network Solutions, Inc.,* 194 F. 3d 980 (9th Cir. 1999) (characterizing NSI's registration and routing services as service rather than product). NSI relies on the fact that "there is no master directory of domain names and IP addresses to which a computer refers[;]" instead, "the domain database is distributed across the Internet, on a multitude of name servers, each responsible for correlating the IP addresses and domain names of computers with its particular 'zone' of the domain name space." 106 F. Supp. 2d at 852. NSI argues that the DNS, which consists of multiple servers distributed around the globe, does not qualify as the type of document necessary for embodiment.

Again, our development of tort law on this novel issue would benefit from your Court's elucidation of the proper treatment of domain names under California tort law. We advance no legal position on the competing arguments but simply offer a neutral characterization of the competing positions. The dissent's discussion of the details of the .com registry and Internet architecture provides a useful backdrop but only serves to highlight the merits of the question and goes beyond the judicial dialogue central to the certification process.

V

The clerk of this court shall forward a copy of this order, under official seal, to the California Supreme Court, along with copies of all briefs and excerpts of record that have been filed with this court. The parties shall notify the clerk of this court within 14 days of any decision by the California Supreme Court to accept or to decline certification. If the California Supreme Court accepts certification, the parties shall file a joint report six months after the date of acceptance and every six months thereafter advising us of the status of the proceedings. The parties shall notify the clerk of this court within 14 days of the issuance of an opinion by the California Supreme Court.

IT IS SO ORDERED.

Respectfully submitted,

_____

Alex Kozinski
United States Circuit Judge

KOZINSKI, Circuit Judge, dissenting.

When a federal court certifies a case to a state supreme court, it draws from a limited reservoir of comity. Certifying the case shifts the difficult work of deciding it to the state court, which is often so busy keeping its own house in order that it scarcely has time for our overflow laundry. Certification also burdens litigants, forcing them to reargue the case in a different forum – a process that is costly and full of delay. None of the parties or amici in our case has so much as hinted that we should certify; Kremen

explicitly urged us not to, citing the many years already spent in litigation.

I am aware of the prevailing infatuation with this procedural device – the "sacred cow in our modern judicial barnyard." Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 Suffolk U. L. Rev. 677, 678 (1995). But we have a duty to use it sparingly and sensibly; that a case raises difficult legal questions is not enough. *See L. Cohen & Co. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1419, 1423 (D. Conn. 1986) (Cabranes, J.). Certification is justified only when the state supreme court has provided no authoritative guidance, other courts are in serious disarray and the question cries out for a definitive ruling.

These circumstances are not present here. We are perfectly capable of answering both questions ourselves, and there is no indication that courts are overrun with lawsuits raising the issue. Cyberspace will not implode if the supreme court confronts the majority's questions at some point in the future rather than today; the issues may well be sharpened by common law development in the meantime.[1]

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[1] The majority draws encouragement from *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). But *Arizonans* was a very different case from ours. The state law there had just been passed by popular initiative and had never been interpreted by the state appellate courts; indeed, the plaintiffs had rushed into federal court in an obvious effort to avoid that possibility. *Id.* at 49, 63 n.18. The state attorney general had urged certification, which would have afforded the state courts an opportunity to address a sensitive issue of state policy and potentially could have avoided a federal constitutional question. *Id.* at 75-80. Here, there is no federal constitutional question lurking in the

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THE CERTIFIED QUESTIONS

By long common law tradition, those who give away the property of others do so at their peril.[2] This case is not about "regulation of the Internet under state law," as the majority believes, *see* Order at 40. It's about general principles of tort law that happen to apply to the Internet because that's the type of property that NSI gave away. Kremen asks only that we afford him the same remedial rights that California law gives other property holders.[3]

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background, and not even the parties themselves – much less the state attorney general – have urged certification.

[2] Conversion is a strict liability tort, so NSI's negligence is not an issue. Nonetheless, NSI's claim that it had no reason to question the authenticity of Cohen's forged letter is too much to bear. Kremen originally registered sex.com to his d/b/a, Online Classifieds, Inc. (OCI), listing himself as the contact. The forged letter stated that OCI had fired Kremen and that its board of directors had "decided to *abandon* the domain name sex.com" to Cohen, giving no explanation whatsoever for this singular generosity. NSI received the letter not from OCI but as an enclosure sent by Cohen; the letter explained, "Because [OCI] do[es] not have a direct connection to the internet, we request that [Cohen] notify the internet registration [sic] on our behalf. . . . " That a company called "Online Classifieds" would have no Internet connection is beyond implausible. Yet NSI made no effort to contact Kremen before giving away the domain name. It's a bit as if Judge Reinhardt sent a letter to the DMV saying, "Judge Kozinski wants you to transfer title to his Lamborghini to me – he'd write to you himself, but he's out of stamps."

[3] The majority's citation to *Moore v. Regents of the University of California*, 51 Cal. 3d 120 (1990), thus misses the mark. *Moore* warned against "creat[ing] new tort duties," *id.* at 146, but only after rejecting the plaintiff's claim under settled law, *id.* at 136. Moreover, the issue in *Moore* was whether the plaintiff had a property right at all, not whether he could sue for conversion to enforce a property right he concededly held. *Id.* at 136-37.

The majority poses two questions. They are of middling difficulty at best; neither merits certification. The California Supreme Court long ago answered the first in Kremen's favor; that precedent alone resolves the dispute before us. The answer to the second question – which we don't even need to reach – is equally obvious.

I. Conversion of Intangibles

The majority's first question is whether, "[f]or the tort of conversion to apply to intangible property, [it is] necessary that the intangible property be merged with a document or other tangible medium." Order at 36. The quaintness of the question, couched in language more reminiscent of postillions than POP servers, gives a pretty good clue that the majority is disinterring legal arcana long since laid to rest. Conversion originated in the fifteenth century as a remedy against one who found a plaintiff's lost goods and put them to his own use. *See Prosser and Keeton on the Law of Torts* § 15, at 89 (W. Page Keeton ed., 5th ed. 1984); J.B. Ames, *The History of Trover*, 11 Harv. L. Rev. 277, 277 (1897). Because of this pedigree, the tort "became encrusted . . . with legal rules that assumed that the property taken was tangible" – the sort of thing that one could "find in a field and later sell at a market." Val D. Ricks, *The Conversion of Intangible Property: Bursting the Ancient Trover Bottle with New Wine*, 1991 B.Y.U. L. Rev. 1681, 1685. This limitation was harmless enough when people's worldly goods consisted of livestock and farm tools, but today it's a relic.

Our first question, then, is whether California still clings to the dated distinction between tangibles and intangibles. Some states do, albeit with significant ad hoc

exceptions to accommodate commercial reality. The *Restatement* extends conversion only to intangible rights "merged" in a document. *Restatement (Second) of Torts* § 242;[4] *see also* cases cited in Ricks, *supra*, at 1689 n.26. Many courts, however, have rejected this distinction altogether and extend conversion to intangibles without regard to the *Restatement's* test.[5]

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[4] The *Restatement* provides:

> (1) Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights.
>
> (2) One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that for conversion, even though the document is not itself converted.

Restatement (Second) of Torts § 242.

[5] *See, e.g., Grynberg Prod. Corp. v. British Gas, P.L.C.*, 817 F. Supp. 1338, 1348 (E.D. Tex. 1993) (intangible contract rights); *Quincy Cablesystems, Inc. v. Sully's Bar, Inc.*, 650 F. Supp. 838, 848 (D. Mass. 1986) (satellite TV signals); *Charter Hosp. of Mobile, Inc. v. Weinberg*, 558 So.2d 909, 910-12 (Ala. 1990) (drug abuse treatment programs); *Nat'l Sur. Corp. v. Applied Sys., Inc.*, 418 So.2d 847, 850 (Ala. 1982) (software programs); *In re Estate of Corbin*, 391 So.2d 731, 732-33 & n.1 (Fla. Dist. Ct. App. 1980) (interests in a business venture, including goodwill); *Northeast Bank of Lewiston & Auburn v. Murphy*, 512 A.2d 344, 348 (Me. 1986) (future rights to receive proceeds); *Foremost Ins. Co. v. Allstate Ins. Co.*, 486 N.W.2d 600, 610 n.3 (Mich. 1992) (intangible lien interests); *Miracle Boot Puller Co. v. Plastray Corp.*, 225 N.W.2d 800, 804 (Mich. Ct. App. 1975) (patent rights), *rev'd on other grounds after remand*, 269 N.W.2d 496 (Mich. Ct. App. 1978); *Schnucks Twenty-Five, Inc. v. Bettendorf*, 595 S.W.2d 279, 284-85 (Mo. Ct. App. 1979) (trade names); *Brown v. Meyer*, 580 S.W.2d 533, 534 (Mo. Ct. App. 1979) (exclusive newspaper distribution areas); *Benaquista v. Hardesty & Assocs.*, 20 Pa. D. & C. 2d 227, 229 (1959) (intellectual property); *Evans v. Am. Stores Co.*, 3 Pa. D. & C.2d 160, 161 (1955) (intangible ideas); *see also United States v. Drebin*, 557 F.2d 1316, 1332

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The California Supreme Court made quick work of the question more than a century ago in *Payne v. Elliot,* 54 Cal. 339 (1880), and has not seen fit to revisit it. Defendants in *Payne* were trustees accused of appropriating plaintiff's securities. They argued for dismissal on the ground that plaintiff had alleged only conversion of the shares, not conversion of the share *certificates.* The court rejected the argument: "[T]he action no longer exists as it did at common law, but has been developed into a remedy for the conversion of *every species of personal property.*" *Id.* at 341 (emphasis added). One can almost hear Justice McKee chortle at counsel's hapless argument as he elegantly disposes of this common law anachronism.

The majority today quotes this passage from *Payne* and ventures that "[t]he question then arises as to the scope of coverage for intangible property." Order at 42. I would have thought this was precisely the question that *Payne* answered, and that its response was "*every species.*" "Personal property," after all, is "[a]ny movable *or intangible* thing that is subject to ownership and not classified as real property." *Black's Law Dictionary* 1233 (7th ed. 1999) (emphasis added). Sex.com, we all agree, is property subject to ownership – namely, Kremen's. And, obviously, it's not real estate.[6] *Payne* therefore squarely controls.

(9th Cir. 1977) (holding that "conversion" under 18 U.S.C. § 2314 applies to intangibles).

[6] Reports to the contrary notwithstanding. *See, e.g.,* Shannon Lafferty, *Legal Battle for Sex.com Continues in Calif.,* Legal Intelligencer, Feb. 1, 2001, at 4 ("the most valuable piece of real estate on the Internet").

Courts applying California law have followed in *Payne's* tracks, recognizing conversion of intangible property without inquiring whether it was merged in a document. *A & M Records, Inc. v. Heilman,* 75 Cal. App. 3d 554 (1977), applied conversion to a defendant who sold unauthorized recordings, holding broadly that "such misappropriation and sale of the intangible property of another without authority from the owner is conversion." *Id.* at 570. In *G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Service, Inc.,* 958 F.2d 896 (9th Cir. 1992), we relied on *A & M Records* and held that unauthorized use of someone else's regulatory approval is conversion – again without asking whether the right in question was merged in a document. *Id.* at 906-07. In *FMC Corp. v. Capital Cities/ABC, Inc.,* 915 F.2d 300 (7th Cir. 1990), the Seventh Circuit, applying California law, explicitly rejected the tangible-intangible distinction. *Id.* at 302, 304-05. It quoted with approval Prosser and Keeton's observation that " 'there is perhaps no very valid and essential reason why there might not be conversion' of intangible property." *Id.* at 305 (quoting *Prosser and Keeton on the Law of Torts, supra,* § 15, at 92).

Most telling, however, is our own recent decision in *Bancroft & Masters, Inc. v. Augusta National Inc.,* 223 F.3d 1082 (9th Cir. 2000). Not only did we recognize conversion of intangibles; we recognized conversion of the very intangible at issue here – a domain name. A majority of the panel held that conversion of a domain name is "tortious conduct" under California law. *Id.* at 1089 (Sneed & Trott, JJ., concurring). And, yet again, we made no reference to any requirement that the property be merged in a document. If this is an issue worth pestering the California Supreme Court about today, why didn't we

certify it two years ago? Nothing has changed in California conversion law since then.

As the majority notes, *Payne* has not been universally followed. In *Olschewski v. Hudson,* 87 Cal. App. 282 (1927), California's intermediate appellate court declared (with remarkable audacity) that *Payne* didn't really mean what it said: that the "every species" language – the very *ratio decidendi* of the case – was "too broad a statement as to the application of the doctrine of conversion." *Id.* at 288. It adopted instead the *Restatement*-like rationale that stock is subject to conversion only because it is "represented by" tangible documents. *Id.* Another case, *Adkins v. Model Laundry Co.,* 92 Cal. App. 575 (1928), followed *Olschewski* on similar facts.

If *Olschewski* and *Adkins* had pointed to intervening cases where the California Supreme Court had retreated from *Payne,* they might give us pause. But they did nothing of the sort; they simply refused to apply controlling precedent by incorrectly labeling it dicta. We are bound by the pronouncement of the state's highest court unless there are convincing reasons to believe that it would no longer adhere to its earlier rationale. *Olschewski* and *Adkins* – like the majority in our case – offer nothing to suggest it would not. "Certification is inappropriate when . . . the supreme court of a state has already ruled and its decision is unambiguous." *United States* v. *Pend Oreille Pub. Util. Dist. No. 1,* 926 F.2d 1502, 1506 n.3 (9th Cir. 1991); *see also Estate of Madsen v. Comm'r,* 659 F.2d 897, 901 (9th Cir. 1981) (Norris, J., dissenting from certification order).

Searching for another reason to doubt *Payne* meant what it said, the majority invokes the *Restatement.* Our

order implies that, unless a state explicitly disclaims the *Restatement's* rules, we'll assume that any deviations from that canonical text must have been an oversight. Poor Justice Brandeis, whose fifty state laboratories have been amalgamated into a single research park run by the American Law Institute.[7]

The majority identifies no convincing reason to believe that the California Supreme Court would overrule *Payne*. Speculation that a state supreme court might revisit a 123-year-old precedent and mail its tort jurisprudence back to the dark ages is not a ground for certification. If it were, we would certify nearly every diversity case we hear.

II. The "Merged in a Document" Test

None of this matters anyhow, because Kremen wins even under the *Restatement*. The majority's analysis on this point is lacking. It cites a handful of state decisions, observes that none involves a domain name and proclaims our interpretive faculties exhausted. This is not a frugal use of the privilege the California Supreme Court affords us. Certification is for resolving true uncertainties in state law; it presupposes that we've made a diligent effort to apply the traditional judicial tools of analogical reasoning.

Kremen can sue for conversion under the *Restatement* because his domain name is in fact merged in a document, and NSI frustrated his use of it. *See Restatement (Second)*

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[7] *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559 (1996), did not "favorably view[]" the *Restatement's* approach, *cf.* Order at 43; it explicitly left the issue unresolved. *Thrifty-Tel*, 46 Cal. App. 4th at 1565-66.

of Torts § 242(2) ("One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to liability. . . . "). His intangible property is (among other things) the right to have people who type "www.sex.com" into their web browsers sent to *his* website. It is, in standard Geek, the right to have the second-level .com domain "sex" associated with *his* IP address in NSI's .com registry.[8] The majority doesn't

[8] The majority's order describes the basic function of the Domain Name System and the fact that it associates domain names with IP addresses – sets of numbers that uniquely identify each computer connected to the Internet. *See* Order at 36-37. But it omits any discussion of how the DNS actually works beyond the observation that it is a "decentralized, albeit hierarchical, process." *Id.* at 20 (quoting *Am. Online, Inc. v. Huang*, 106 F.Supp.2d 848, 851 (E.D. Va. 2000)). The majority's failure to analyze the DNS and the role that NSI's .com registry plays within it helps explain why it can't detect a document in this case.

NSI's .com registry, also known as the ".com zone file," associates particular second-level .com domains like "sex" with particular IP addresses. If a browser wants to find the website "www.sex.com," it goes through the following steps: It first looks in a "root" registry to find out who has the list of .com addresses – and that root registry says "NSI." It then looks in NSI's .com registry to find out who has the list of sex.com addresses – that registry (now) says "Gary Kremen." Finally, it looks in Gary Kremen's sex.com registry to find out where the website www.sex.com is located. (These registries don't literally say "NSI" and "Gary Kremen"; they list the IP addresses of their computers. But it's the same idea.) Thus, while the DNS *as a whole* is a "decentralized, albeit hierarchical, process," NSI's .com registry is not – it's just a list of second-level .com domains and corresponding IP addresses; a document in any relevant sense of the word. *See generally* Brief of Amicus Curiae Electronic Frontier Foundation at 6-8; *Thomas v. Network Solutions, Inc.*, 176 F.3d 500, 503-04 (D.C. Cir. 1999); Improvement of Technical Management of Internet Names and Addresses, 63 Fed. Reg. 8826, 8826 (Feb. 20, 1998); Milton L. Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace* 41-43, 46 fig.3.5, 194-96

(Continued on following page)

dispute, nor could it, that NSI prevented Kremen's use of his property when it handed sex.com over to Cohen. The only question under the *Restatement* is whether Kremen's property is merged in NSI's .com registry.[9]

It most certainly is. NSI's registry is the master list that associates .com domains like "sex" with particular IP addresses. It's essentially a ledger with domains in one column and IP addresses in another. *See Thomas,* 176 F.3d at 505. The fact that the ledger is electronic rather than ink-and-paper doesn't make it any less a document (this dissent is still a document even if you're reading it online). *See Thrifty-Tel,* 46 Cal. App. 4th at 1565; *cf. eBay, Inc. v. Bidder's Edge, Inc.,* 100 F. Supp. 2d 1058, 1069 (N.D. Cal. 2000). Web browsers determine what server is associated with a particular .com domain from the information in NSI's registry.[10] Modify an IP address in the registry, and

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(2002); *InterNIC FAQs: The Domain Name System* (Mar. 25, 2002), *at* http://www.internic.net/faqs/authoritative-dns.html.

[9] The majority bases almost its entire discussion on the mistaken assumption that the relevant document is the decentralized DNS as a whole. Order at 44-46. The only part of the DNS at issue here is NSI's registry of .com domains – the .com zone file. NSI's claim that "there is no master directory of domain names and IP addresses to which a computer refers" is true but irrelevant. Other registries list the second-level domains in . gov, .mil, .edu and the like; still others list the third-level domains within each second-level .com domain. But NSI's registry of second-level . com domains is the only piece of the DNS that matters in this case because Kremen's entry in this particular registry is what NSI gave away. NSI's .com registry, not the DNS as a whole, is the document in which Kremen's property is merged.

[10] NSI's .com registry isn't actually consulted directly on every query, because other servers copy and store its information in order to speed up response times. If a browser wants to know an IP address, it may get it from a nearby server that previously copied the information from NSI. *See Thomas,* 176 F.3d at 503-04; Mueller, *supra,* at 48;

(Continued on following page)

you change the server with which a domain is associated; someone expecting to find my web page will be sent to yours instead. It's hard to imagine an intangible right that's more closely merged in a document.

There are several analogues to NSI's .com registry in the case law, but the closest is a corporate share register. A share register qualifies as a document in which shares are merged. *See Phansalkar v. Andersen Weinroth & Co.*, 175 F. Supp. 2d 635, 641-42 (S.D.N.Y. 2001) (deriving this point from *Payne*); *cf. Payne*, 54 Cal. at 342 ("[T]he certificate is only evidence of the property; and it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder: the certificate is, therefore, but additional evidence of title. . . . ").[11] The relationship between a share

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InterNIC FAQs, supra. The fact that other servers copy information in NSI's registry for ease of reference, however, doesn't change the fact that NSI's registry is the authoritative listing of .com domains. *Thomas*, 176 F.3d at 505; 63 Fed.Reg. at 8828; Mueller, *supra*, at 196. When NSI changes an entry in its registry, other servers all over the world copy the updated information, typically within 24-48 hours. *See Modifying Your Domain Name Record* (2002), *at* http://www.netsol.com/en_US/help/modify-dnr-06.jhtml.

[11] *Payne* did not so hold, of course; it imposed no merger requirement at all. It held that share registers and share certificates have the same *evidentiary* function. *See Payne*, 54 Cal. at 342. But the corollary for states that do follow the merger requirement is that these equivalent evidentiary functions imply an equivalent ability to satisfy the merger requirement – which is precisely what *Phansalkar* held, 175 F. Supp. 2d at 641-42. Courts routinely recognize conversion of uncertificated shares. *See, e.g., Haskell v. Middle States Petroleum Corp.*, 165 A. 562, 563 (Del. Super. Ct. 1933); *Connelly v. Estate of Dooley*, 422 N.E.2d 143, 147 (Ill. App. Ct. 1981); *Mahaney v. Walsh*, 16 A.D. 601, 605-06 (N.Y. App. Div. 1897). Uncertificated shares by definition are not "customarily merged in" share certificates; the merging document must

(Continued on following page)

and a share register is quite similar to that between a .com domain and NSI's .com registry. Both documents are databases whose entries identify who gets the benefits of a particular intangible right – which shareholder gets dividends; whose computer gets Internet traffic.[12]

California courts have long held that a shareholder can sue a corporation for conversion if it wrongfully refuses to transfer title to shares on its books. *Ralston v. Bank of Cal.,* 112 Cal. 208, 213 (1896). A corporation that actually gives away a shareholder's stock by wrongfully amending its share register is similarly liable. *See* 5 B.E. Witkin, *Summary of California Law* § 621, at 716 (9th ed. 1988). An owner of a domain registry who wrongfully gives away a registrant's domain name is in precisely the same position.

Cases where a defendant is held liable for converting a document are also instructive. *Plunkett-Jarrell Grocery Co. v. Terry,* 263 S.W.2d 229 (Ark. 1953), for example, cited with approval in the *Restatement, see Restatement (Second) of Torts* § 242 cmt. b & reporter's notes, involved a

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be something else – for example, the share register, *see Phansalkar,* 175 F. Supp. 2d at 642.

[12] A share register identifies the person who owns the shares, while the .com zone file only identifies the address of the owner's computer. Even if this difference mattered – which seems hard to believe – domain names are explicitly linked to their owners in another document, the "WHOIS database" maintained by the registrar (also NSI in this case). Kremen's WHOIS record for sex.com, for example, can be retrieved by typing "sex.com" into the web interface of NSI's WHOIS server, currently located at http://www.netsol.com/cgi-bin/whois/whois. NSI's WHOIS database seems to be yet another document in which Kremen's property is merged.

defendant who took the plaintiff's account book, preventing him from collecting his receivables. *Plunkett-Jarrell Grocery Co.,* 263 S.W.2d at 233-34. The court allowed damages for the lost accounts, not merely for the paper they were recorded on. *Id.* at 234; *see also Pioneer Commercial Funding Corp. v. United Airlines, Inc.,* 122 B.R. 871, 884-85 (S.D.N.Y. 1991). Under the *Restatement,* an account receivable is thus merged in an account book. Kremen's domain name and NSI's .com registry are at least as closely related as an account receivable and an account book. In both cases, the document is merely a list of intangibles that's instrumental to enjoyment of the plaintiff's rights.[13]

One can imagine arguments against recognizing conversion of all intangibles, but none applies to domain names. Some intangibles are vaguely defined and may not give the defendant fair notice of the plaintiff's property right. *See Olschewski,* 87 Cal. App. at 288 (alluding to the need for "evidence of a definite interest"). But domain names, like corporate stock, are clear and discrete property rights. One who alters title to a registered domain name is fairly on notice that he may be affecting someone else's property.

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[13] In our case, the document itself wasn't converted; the .com zone file remained in NSI's hands throughout. But that means only that Kremen's claim sounds in section 242(2) of the *Restatement* rather than section 242(1). *Compare Restatement (Second) of Torts* § 242(2) ("One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to liability. . . . "), *with id.* § 242(1) ("Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights."). "Merged" surely can't mean one thing in one section and something else in the other.

A second difficulty arises when the property is a "nonexclusive" intangible like a trade secret, the theft of which does not actually prevent the plaintiff's use. *See* Ricks, *supra,* at 1705-07 & n.100. But domain names are exclusive intangibles (again, just like corporate stock). A defendant who wrongfully takes a domain name deprives the plaintiff of its use entirely. Domain names are much more like corporate stock or accounts receivable than they are like customer goodwill or trade secrets – intangibles that many courts applying the *Restatement* have declined to protect, *see Restatement (Second) of Torts* § 242 cmt. f & reporter's notes.

These considerations merely reinforce a conclusion that the case law compels. We don't need the California Supreme Court to spell out the inevitable consequences of the state's jurisprudence every time a new species of property emerges. California law, even narrowly construed, recognizes conversion of property that shares all the relevant features of domain names. That's all we need to know to decide the case.

COMITY AND RESPONSIBILITY

Although the great majority of states – including all those in our circuit – now have certification procedures, California came to the process late. It adopted its rule less than five years ago, and only after endless carping from the bar. *See, e.g.,* Jerome I. Braun, *A Certification Rule for California,* 36 Santa Clara L. Rev. 935 (1996). Even then, California adopted a rule much narrower than those of other states in our circuit. Other states permit certification from any federal court, but California accepts only questions certified by a court of appeals or the United

States Supreme Court. *Compare* Cal. Rules of Court 29.5(a) *with, e.g.,* Ariz. Sup. Ct. R. 27(a)(1). The California Supreme Court has also been more parsimonious in accepting certified questions. It's practically unheard of for a supreme court of another state to reject a certified question of our court.[14] California, though, has rejected one-third of the cases we've certified to it since the rule went into effect. *See* Appendix tbl. 1.

The California Supreme Court's evident ambivalence toward the certification process reflects the brutal realities of supervising the judiciary of the most populous state in the nation. Congestion in the California Supreme Court has been a fixture ever since the state was admitted to the Union. *See* Karl Manheim, *The Business of the California Supreme Court: A Comparative Study,* 26 Loy. L.A. L. Rev. 1085, 1092 (1993). The court delivers about 100 written opinions per year – twenty-five percent more than the United States Supreme Court, with two fewer justices. *Compare* Judicial Council of Cal., *2002 Annual Report: Court Statistics Report* 9 tbl.6 [hereinafter *Court Statistics*] (103 opinions for 2000-2001), *with* Admin. Office of the U.S. Courts, *2001 Judicial Business* 73 tbl.A-1 [hereinafter *Judicial Business*] (83 opinions for 2000-2001). Overall, the court disposes of some 9000 cases per year, up more than sixty percent from ten years ago, and once again more than the corresponding figure for the United States Supreme Court. *Compare Court Statistics, supra,* at 4 tbl.1 (9047 dispositions for 2000-2001, compared to 5466

[14] Even when it's painfully obvious that we asked the wrong question. *See, e.g., Scheehle v. Justices of the Supreme Court,* 57 P.3d 379 (Ariz. 2002).

for 1991-1992), *with Judicial Business, supra,* at 73 tbl.A-1 (7762 dispositions for 2000-2001).

The seven justices of the California Supreme Court sit atop a judiciary with approximately 100 justices in the courts of appeal and 2000 judicial officers in the superior courts. *Court Statistics, supra,* at 18 tbl.1 (96.8 justice full time equivalents); *id.* at 39 tbl.1 (1998.0 judge, commissioner and referee FTEs). By comparison, Washington, the next most populous state in our circuit, has a nine-member supreme court but only thirty judicial officers in the courts of appeals and only about 400 in the superior, district and municipal courts combined. *See Washington Courts, at* http://www.courts.wa.gov/courts/ (last visited Oct. 15, 2002) (court of appeals directories listing 22 judges and 8 commissioners); *Superior Court 2001 Annual Caseload Report* 31 tbl., *at* http://www.courts.wa.gov/caseload/ (175 judges plus 49 commissioner FTEs); *Courts of Limited Jurisdiction 2001 Annual Caseload Report* 43 tbl., *at* http://www.courts.wa.gov/caseload/ (151 judge FTEs plus 31 commissioner FTEs).

The California Supreme Court is further hamstrung by its mandatory death penalty jurisdiction; it reviews an automatic direct appeal from every case where a death sentence is imposed. *See Court Statistics, supra,* at 4 tbl.1. This is a daunting prospect, with California's death row now numbering 600 and still growing. *See* Gerald F. Uelmen, *Courtly Manners,* Cal. Law., July 2001, at 37, 74.[15] As we know from our own experience, capital cases –

[15] The only reason that the court's death penalty docket is at all manageable, apparently, is a parallel shortage of appointed counsel. Uelmen, *Courtly Manners, supra,* at 74.

often raising dozens of issues – are far more burdensome than most. The supreme court's death penalty docket has at times strained its ability to act as the "architect of California case law." Gerald F. Uelmen, *The Lucas Court: A First Year Report Card,* Cal. Law., June 1988, at 30, 31; *see also* Stephen R. Barnett, *California Justice,* 78 Cal. L. Rev. 247, 251 (1990) (book review).

Even if the California Supreme Court turned down our certification request, we would still have taken up a disproportionate amount of the court's time and attention. Our requests are doubtless given far closer scrutiny than the run-of-the-mill petition of an ordinary litigant. The supreme court has turned down a significant number of our certified cases, but this cannot have been an easy or pleasant task, and it would surely grant review if at all possible. We should avoid forcing the court to make the awkward choice between agreeing to answer a question that really doesn't deserve its attention and telling us we're out to lunch. In some instances, all reasonable minds will agree that the court's intervention is needed. But here, no party or amicus has suggested certification, and even our own panel is divided. We surely have a poor candidate for imposing on the California Supreme Court's goodwill.[16]

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[16] The majority declines to consider the burden we impose on the state supreme court when we force it to rule on our certification requests, opining that "it is not our role to pass advance judgment on the Court's priorities." Order at 35. By that logic, we would certify every case on our diversity docket – and every Federal Tort Claims Act case too – so that the state supreme court could have first crack at the state law issues presented. Surely, exercising some judgment about the productive use of the state court's time and resources, not to mention

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The crowded California docket also means that certification is a less efficient mechanism for ascertaining state law. The cases we send to the California Supreme Court are beset by the same delays that plague the rest of its caseload. The average length of time from certification order to decision is well over a year and a half. *See* Appendix tbl.1; *cf.* Stephen R. Barnett, *Un-Rocket Docket,* Cal. Law., May 2002, at 17, 17 (average time on docket for all non-death penalty cases of 543 days). This is approximately triple the national average computed by one comprehensive study from the 1980s. *See* Carroll Seron, *Certifying Questions of State Law: Experience of Federal Judges* 39 tbl.7 (Fed. Judicial Ctr., FJC Staff Paper 83-1, 1983) (six to seven months).[17] One case was gone for more than two and a half years. *See Vu v. Prudential Prop. & Cas. Ins. Co.,* 172 F.3d 725 (9th Cir. Apr. 19, 1999), *certified question answered,* 26 Cal.4th 1142 (Nov. 5, 2001), *conformed to answer,* 291 F.3d 603 (9th Cir. May 22, 2002). None has taken less than 500 days. *See* Appendix tbl.1.

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those of the parties, is part of our responsibility in deciding whether to certify.

California's rule, moreover, requires that the certification order be signed by the presiding judge, making no allowance for a situation, like ours, where the presiding judge is in dissent. Cal. Rules of Court 29.5(d). This has led to the odd situation where I find myself dissenting from an order that bears my signature. *Cf. Crocker Nat'l Bank v. Clark Equip. Credit Corp.*, 724 F.2d 696, 700 n.3 (8th Cir. 1984) (Lay, C.J.) ("As author of this opinion, I dissent. . . ."). The drafters of California's certification rule obviously did not anticipate that the presiding judge would dissent, which means they contemplated cases would only be certified when all panel members agree.

[17] Turnaround times for the next two largest states in our circuit are shorter. Washington typically returns cases to us in about nine months; Arizona usually takes about a year.

Even to deny a certification request takes on average close to three months. *See id.* Given the unique pressures facing the California Supreme Court, these statistics are easy to understand. Delays are an unavoidable consequence of this cross-jurisdictional procedure, but they are far longer when the state court is already overburdened with its own work.

Certification burdens litigants, who foot the bill while their lawyers reargue the controversy in a different forum. The parties will now file briefs in the California Supreme Court, explaining why it should or should not accept the certification request. Cal. Rules of Court 29.5(e)(1). Next, they will reply to each other's briefs. *Id.* 29.5(e)(4). If the court accepts the request, the parties will file more briefs and replies, arguing the case on the merits. *Id.* 29.5(h)(1). Once the state supreme court sends the case back to us, the parties will no doubt want to argue some more over how we should interpret its response. These are the sorts of things that make lawyers rich but litigants understandably frustrated. The prospect is particularly troublesome in this case – Kremen has already spent the past four years in litigation trying to get compensation for the profits he lost because of Cohen's theft and NSI's alleged bungling.

This is a complex case, but not in a way that justifies certification. Whether NSI's .com registry is a document in which intangible property rights are merged is a hard technical question, not a hard legal one. It's a matter of coming up with the right analogy, and that has more to do with understanding how the Internet works than with state property law. The relevant facts are not genuinely disputed, but it takes a close reading to reconcile the competing characterizations, and a familiarity with the

underlying technology doesn't hurt. We're certifying this case to the California Supreme Court, not to the ghost of Jonathan Postel;[18] as far as I know, the former has no unique expertise in the field of Internet architecture.

This case happens to be in federal court because the parties are from different states, but there is nothing inevitable about this party alignment. If the issue is as far-reaching as the majority believes, it will come up in state court soon enough. But I doubt the case really *is* that far-reaching. The facts date back to the Wild West days of domain name registration, when NSI had no written contracts with registrants. NSI changed that policy long ago. Domain name contracts are relevant because they provide for significant limits on liability and because they may affect the scope of the property right conferred. Future cases involving conversion of domain names will raise different questions. This decision will no doubt be relevant, but it won't be dispositive.

The California Supreme Court is always free to overrule any decision we render on the subject. It may even benefit from the insights we are able to offer, just as it benefits from prior consideration by state court judges. In this sense, we are just like another state court of appeal. We do California no favors by asking its supreme court to solve our problems while we stand mutely by.

[Appendix Omitted In Printing]

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[18] Nor to Al Gore, for that matter.

APPENDIX D

(9th Cir. No. 01-15899)
S112591

IN THE SUPREME COURT OF CALIFORNIA

En Banc

GARY KREMEN, Plaintiff and Appellant;
ONLINE CLASSIFIEDS, INC., Plaintiff,

v.

STEPHEN MICHAEL COHEN, Defendant;
NETWORK SOLUTIONS, INC., Defendant.

(Filed Feb. 25, 2003)

The request, made pursuant to California Rules of Court, rule 29.8, that this court decide a question of California law presented in a matter pending in the Ninth Circuit Court of Appeals, is denied.

/s/ GEORGE
Chief Justice

APPENDIX E

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY KREMEN,

Plaintiff-Appellee,

and

ONLINE CLASSIFIEDS, INC.,

Plaintiff,

v.

STEPHEN MICHAEL COHEN, an individual; OCEAN FUND INTERNATIONAL, LTD., a foreign company; SAND MAN INTERNACIONAL LTD., a foreign company; YNATA, LTD.,

Defendants-Appellants,

and

SPORTING HOUSES MANAGEMENT CORPORATION, a Nevada company; SPORTING HOUSES OF AMERICA, a Nevada company; SPORTING HOUSES GENERAL INC., a Nevada company; NETWORK SOLUTIONS, a Delaware company; WILLIAM DOUGLAS, Sir, an individual; VP BANK (BVI) LIMITED, a foreign company; ANDREW KEULS, an individual; MONTANO PROPERTIES LLC, a California Limited Liability Company,

Defendants.

No. 01-15886

D.C. No. CV-98-20718-JW

ORDER

(Filed Jan. 3, 2003)

Before: **KOZINSKI** and **McKEOWN,** Circuit Judges, and **FITZGERALD,*** District Judge.

The petition for rehearing and rehearing en banc is DENIED. Fed. R. App. P. 35, 40.

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* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

APPENDIX F

[LEFT HEADER:
STAMP OF THE MEXICAN REPUBLIC]
ATTORNEY GENERAL'S OFFICE OF THE STATE OF BAJA CALIFORNIA

[RIGHT HEADER:
STAMP OF THE ATTORNEY GENERAL'S OFFICE]

ATTORNEY GENERAL'S OFFICE OF THE STATE OF B.C.

SUBPOENA

MR. STEPHEN MICHAEL COHEN

PRESENT

I am writing to inform you that you must appear at this H. Authority, located in RIO SUCHIATE W/O NUMBER ST., COLONIA REVOLULUCION, to resolve a procedure of CRIMINAL CHARACTER, which will take place on JULY the 30th, 2001 at 09:00 in the DEPARTMENT OF CITIZEN CARE within control number 0422241. If you fail to appear as required, the appropriate sanctions established by Law will be applied, such as ARREST or FINE for multiple minimum wages. Moreover, you are asked not to abandon the city until you attend the said appointment.

Tijuana, B.C., June 29, 2001

SINCERELY
SUFRAGIO EFECTIVO NO REELECCION
(EFFECTIVE VOTE, NO REELECTION)
CHIEF OF THE DEPARTMENT OF CITIZEN CARE OF THE ATTORNEY'S GENERAL OFFICE OF COMMON ORDER

MS. GABRIELA CARRILLO GARCIA.

[LEFT FOOTER:
STAMP OF THE ATTORNEY GENERAL'S
OFFICE OF TIJUANA]
ATTORNEY GENERAL'S OFFICE
CITIZEN CARE
CENTRAL AREA, TIJUANA, B.C.

[RIGHT FOOTER:
STAMP]

[ESTE DOCUMENTO NO ES VALIDO = THIS DOCUMENT IS NOT VALID]

The undersigned MR. FRANCISCO JAVIER COSSIO GUTIERREZ, Area's Assistant to the Attorney General, located in Tijuana, with the faculties conferred by Article 44, Fraction IV of the Organic Law of the Attorney General's Office of the State;

CERTIFIES

That the signature at the end of this document, from Control Slip 0405765 belongs to MS. GABRIELA CARRILLO GARCIA, CHIEF OF THE DEPARTMENT OF CITIZEN CARE in the Attorney General's Office of Common Order Central Area, written in one (01) usable sheet, in the City of Tijuana, B.C., on July the 2nd of the year two thousand and one.

MR. FRANCISCO J COSSIO GUTIERREZ
AREA'S ASSISTANT TO THE ATTORNEY GENERAL,
LOCATED IN TIJUANA, B.C.

[LEFT FOOTER:
STAMP OF THE ATTORNEY GENERAL'S OFFICE]

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02-T/080/01

Mexico

Comment

Haya Convention of October 5, 1961

Rights: $632.37
Order No. T/080/01

In Mexico, this public document has been signed by MR. FRANCISO JAVIER COSSIO GUTIERREZ, acting as *AREA'S ASSISTANT TO THE ATTORNEY GENERAL. LOCATED IN TIJUANA, OF THE ATTORNEY GENERAL'S OFFICE OF THE STATE OF BAJA CALIFORNIA.* and it has the required stamp of the *ATTORNEY GENERAL'S OFFICE OF THE STATE OF BAJA CALIFORNIA, AREA'S DIVISION.* Certified in *TIJUANA, B.C.* by *PUBLIC ACCOUNTANT JOSE CERVANTES COVIA, UNDERSECRETARY OF THE TIJUANA GOVERNMENT, TECATE-ROSARITO* on JULY the 5th, 2001.

_____
Signature